**AMERICAN INTERNATIONAL ASSURANCE CO LTD** *a*

**v.**

**DATO' LAM PENG CHONG & ORS**

COURT OF APPEAL, KUALA LUMPUR *b*
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-04-15-97]
5 APRIL 1999 *c*

***LABOUR LAW:*** *Employment - Whether person a 'workman' - Insurance agents and agency leaders - Whether employed by insurance company under contract of service - Whether merely independent contractors engaged under contract for services*

***ADMINISTRATIVE LAW:*** *Remedies - Certiorari - Whether available to correct erroneous findings of fact - Whether Industrial Court committed error of law in award - Whether erred in Anisminic sense - Wednesbury unreasonableness* *d*

***INSURANCE:*** *Agents - Agents and agency leaders - Whether workmen within Industrial Relations Act 1967 - Whether employed under contract of service - Whether independent contractors engaged under contract for services* *e*

***LABOUR LAW:*** *Industrial Court - Jurisdiction - Preliminary objection as to threshold jurisdiction - Whether properly taken - Whether challenge to threshold jurisdiction must be by way of certiorari and prohibition only* *f*

The appellant, an insurance company, had contracted the respondents as agents and as agency leaders respectively under two separate contracts. Under the agents contract, the respondents received commissions for the sale of policies issued by the appellant. Under the agency leaders contract, the respondents' duties included the recruitment, training and supervision of agents. In 1981, the appellant wanted to replace the existing agency leaders contract with a new contract which contained an additional clause negating any employer-employee relationship. The respondents refused the new contract and the appellant terminated the existing agency leaders contract. The respondents treated this as a dismissal without just cause or excuse and the matter was taken to the Industrial Court. *g* *h*

*i*

At the hearing, the appellant raised the preliminary objection that the Industrial Court lacked the jurisdiction to adjudicate the dispute as the respondents were not workmen. The Industrial Court dismissed the objection and held in its award that the respondents were workmen within the Industrial Relations Act 1967 ('the Act'). The appellant applied to the High Court for *certiorari* to quash the award. The High Court dismissed the application.

Before the Court of Appeal, the appellant submitted that the respondents were independent contractors engaged under contracts for services and not workmen employed under contracts of service. It was argued that the agency leaders contract had merged into the agents contract, so that, in fact, the respondents had only a single contract which excluded an employer-employee relationship. The respondents argued that there was no error of law as the Industrial Court had taken into account relevant considerations in making the award and thus its decision was not tainted with *Wednesbury* unreasonableness.

**Held:**
**Per Gopal Sri Ram JCA**

**[1]** On the totality of the evidence the Industrial Court found that the respondents were workmen employed under contracts of service. The Industrial Court also correctly concluded that the respondents were employed in two capacities and that it was the agency leaders contract that was the subject matter of the dismissal. The Industrial Court adopted the correct approach, asked itself the right questions and took into account relevant considerations in making the impugned award. Therefore, the award did not have any errors of law in the wider *Anisminic* sense.

**[2]** *Certiorari* goes only in cases where an error of law is disclosed. The remedy is not available to correct erroneous findings of fact made by a public decision-maker. Here, the arguments in support of the appeal were in reality criticisms of the facts as found by the Industrial Court. It was therefore not permissible to issue *certiorari*.

**[3]** Even if the appellant's attack on the award was grounded upon *Wednesbury* unreasonableness, any reasonable tribunal would, upon the findings of fact made by the Industrial Court, have come to the same conclusion, namely, that the contracts the respondents had with the appellant were contracts of service.

**[4]** The taking of a preliminary objection as to the threshold jurisdiction of the Industrial Court, as was done in the instant case, does not fall within the scheme of the Act and should not, save in limited cases, be countenanced.

*[Appeal dismissed; matter remitted to Industrial Court.]*

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu, sebuah syarikat insuran, telah mengambil perkhidmatan responden sebagai agen dan ketua agensi di bawah dua perjanjian berasingan. Di bawah perjanjian pertama, responden menerima komisyen sebagai agen daripada polisi yang dikeluarkan oleh perayu. Di bawah perjanjian kedua, tugas responden sebagai ketua agensi termasuk pengambilan ahli, latihan dan pengendalian agen-agen. Pada 1981, perayu telah mencadangkan penggantian perjanjian ketua agensi lama dengan yang baru tetapi perjanjian baru itu mengandungi satu klausa tambahan yang menolak kewujudan perhubungan majikan/pekerja. Responden enggan menerima perjanjian baru tersebut dan perayu telah membatalkan perjanjian dengan responden. Pihak responden telah menganggap tindakan ini sebagai pemecatan tanpa sebab atau alasan wajar dan perkara ini telah di bawa kepada Mahkamah Perusahaan.

Pada permulaan perbicaraan, perayu telah menimbulkan satu bantahan awal bahawa Mahkamah Perusahaan tiada bidangkuasa untuk memutuskan perselisihan ini kerana responden bukan pekerja. Yang arif Pengerusi telah menolak bantahan awal ini dan memutuskan di dalam award beliau bahawa responden adalah pekerja di bawah Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Perayu telah membuat permohonan kepada Mahkamah Tinggi untuk *certiorari* untuk menumpaskan award tersebut. Mahkamah Tinggi telah menolak permohonan perayu.

Di hadapan Mahkamah Rayuan, perayu telah menghujah bahawa responden adalah kontraktor bebas yang digaji di bawah 'contract for service' dan bukan pekerja yang digaji di bawah "contract of services". Beliau selanjutnya menghujah bahawa perjanjian ketua agensi telah bercantum dengan perjanjian agen menyebabkan responden mempunyai satu perjanjian sahaja yang menolak kewujudan perhubungan majikan/pekerja. Oleh itu, Mahkamah Tinggi telah membuat kesalahan kerana keengganannya mengeluarkan *certiorari*. Peguambela bagi responden telah menegaskan bahawa tiada kesalahan undang-undang kerana Mahkamah Perusahaan telah mengambil perhatian hanya perkara yang relevan apabila membuat award tersebut dan keputusannya tidak dicemar oleh 'Wednesbury unreasonableness'.

**Diputuskan:**
**Oleh Gopal Sri Ram HMR**

**[1]** Selepas meneliti segala keterangan di hadapannya Mahkamah Perusahaan mengambil keputusan bahawa responden telah digaji di bawah 'contract of service'. Mahkamah Perusahaan juga memutuskan dengan betul bahawa responden telah digaji di dalam dua kedudukan dan adalah perjanjian sebagai ketua agensi yang menjadi hal pemecatan. Mahkamah Perusahaan telah memakai pendekatan yang betul, telah bertanya dirinya soalan yang

betul dan telah mengambil kira perkara yang relevan apabila membuat award yang dipertikaikan. Berikutan dari ini award yang dipertikaikan tidak mengandungi mana-mana kesalahan undang-undang di dalam maksud *Anisminic* yang lebih luas.

**[2]** *Certiorar*i hanya terpakai di kes-kes di mana kesalahan undang-undang adalah dikemukakan. Remedi ini adalah tidak terpakai untuk membetulkan kesimpulan fakta yang salah oleh seorang pembuat-keputusan awam. Di dalam kes ini, penghujahan yang dikemukakan untuk menyokong rayuan ini adalah sebenarnya kritikan trhadap fakta yang dijumpai oleh Mahkamah Perusahaan. Oleh itu adalah tidak dibenarkan untuk mengeluarkan *certiorari* di dalam keadaan kes ini.

**[3]** Kalaupun pengkritikan perayu atas award di kes ini adalah dibaca atas alasan 'Wednesbury unreasonableness', mana-mana tribunal yang munasabah akan, atas keputusan fakta oleh Mahkamah Perusahaan, akan membuat keputusan yang sama, iaitu, bahawa perjanjian yang responden ada dengan perayu adalah 'contract of service'.

**[4]** Penimbulan bantahan awal mengenai hal bidangkuasa Mahkamah Perusahaan, yang mana dibuat di dalam kes ini, tidak jatuh di bawah tujuan Akta dan tidak patut, kecuali di dalam kes terhad, dibenarkan.

*[Rayuan ditolak; kes dipindah balik kepada Mahkamah Perusahaan.]*

**Case(s) referred to:**
*Dr A Dutt v. Assunta Hospital & Anor [1981] 1 MLJ 304* ***(refd)***
*Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687* ***(foll)***
*Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777* ***(foll)***
*Sawarn Singh v. State of Punjab AIR [1976] SC 232* ***(refd)***
*Sykt Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748* ***(refd)***
*William Jacks & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235* ***(refd)***

**Legislation referred to:**
Industrial Relations Act 1967, s. 20

*For the appellant - Dato' Dominic Puthucheary (Asmet Nasaruddin & Feroz Hussein with him); M/s Puthucheary, Asmet & Feroz*
*For the respondents - KP Gengadharan (Hector Sankey with him); M/s Genga, Maha Wong & Co*

*[Appeal from High Court, Kuala Lumpur; Originating Motion No: R8-32-171-1988]*

*Reported by Cindy Chan & Gan Peng Chiang*

**JUDGMENT**

**Gopal Sri Ram JCA:**

The sole question at issue in this appeal is whether the Industrial Court exceeded its jurisdiction in holding the respondents to be workmen within the Industrial Relations Act 1967 ("the Act"). The background against which that question arises is as follows.

The appellant is a company whose business is life insurance. The respondents were engaged by the appellant in two capacities; as agents and as agency leaders. In the former capacity, the respondents sold policies issued by the appellant to members of the public desirous of having their lives insured. They derived a commission from the appellant for such sales on a prescribed scale. In the latter capacity, the respondents had divers duties according to the particular designation each held. The designations were "Agency Supervisor", "Agency Manager", "District Manager", "Manager" and "Senior Manager". The duties of the respondents as agency leaders included the recruitment, training and supervision of agents who were in the business of selling the appellant's policies. In the performance of these duties, the respondents were under the appellant's control and supervision. The appellant paid each respondent emoluments for the performance of their respective duties as agency leaders. Each respondent had two separate contracts with the appellant; an agent's contract and an agency leader's contract. The former contract had a specific provision which negated the creation of an employer/employee relationship. The latter contract did not contain any such term. In 1981, the appellant wanted to replace the existing agency leaders contract with a new contract. This new contract contained an additional clause which had the effect of negating any employer/employee relationship between the appellant and each of the respondents. The respondents were not prepared to accept the new contract. The appellant then terminated their contracts as agency leaders. A dispute arose. The respondents considered themselves to have been dismissed without just cause or excuse. They set in motion the machinery provided by s. 20 of the Act. On 8 June 1985, 1 July 1985 and 19 August 1985, the Minister referred the dispute between the parties to the Industrial Court. The parties exchanged pleadings and the matter was set down for hearing on 9 November 1985. At the outset, the appellant took a preliminary objection that the respondents were not workmen so that the Industrial Court lacked jurisdiction to adjudicate upon the dispute. After a hearing that lasted 67 days spread over almost three years, during which evidence was led and comprehensive submissions were made, the learned chairman of the Industrial Court dismissed the appellant's preliminary objection. In his award dated 31 October 1988, he held that the respondents were workmen within the Act. The appellant then moved the High Court for *certiorari* to quash the award. The High Court declined *certiorari*. It is against this refusal that the present appeal has been brought.

In support of the appeal, Dato Dominic Puthucheary of counsel for the appellant argues that the Industrial Court fell into error because it misunderstood the evidence led before it. It is his submission that the totality of the evidence, both oral and documentary, reasonably supports the conclusion that the respondents were independent contractors engaged under contracts for services and not workmen employed under contracts of service. Counsel submits that the agency leaders contract of each of the respondents had merged into the agency contracts that they had with the appellant so that in truth and fact each respondent had only one contract with the appellant. That single contract excluded any relationship of employee so that the respondents were at all material times independent contractors of the appellant. He says that if the award in the present case is permitted to stand, it would have a serious impact upon the insurance industry because persons in the like position of the instant respondents who have been traditionally regarded by insurance companies as independent contractors will now be held to be workmen. It was submitted that the High Court had therefore erred in refusing to issue *certiorari* to quash the award of the Industrial Court.

Encik Gengadharan who appeared for the respondents has argued that the award of the Industrial Court is not flawed by any error of law. That court had proceeded to determine whether the respondents were independent contractors engaged under contracts for services or whether they were persons who had been employed under contracts of service. The Industrial Court therefore asked itself the right question. In arriving at its conclusion that the respondents were workmen under the Act, the Industrial Court had regard to the particular factual matrix, the admissions made by the appellant through its witnesses as well as in its documents and the nature of the engagement in the circumstances of the present case. The Industrial Court therefore took into account only relevant considerations when making its award. Further, any reasonable tribunal similarly circumstanced would have come to the same conclusion so that the decision arrived at is not tainted by "Wednesbury unreasonableness". Encik Gengadharan has also argued that if the appellant's invitation to intervene be accepted by this court, it would be an unwarranted exercise of appellate jurisdiction over the Industrial Court, whereas what the present appeal is concerned with are *certiorari* proceedings.

Having considered the arguments advanced by both sides and having carefully read the voluminous records of appeal provided to us, we have come to the conclusion that this appeal must fail. There are several reasons for our decision.

First, the issue whether a person is a workman as defined by the Act depends upon the nature of the engagement in a given case. A person is a workman if he is engaged under a contract of service. But he is an independent contractor and therefore not a workman if his engagement is pursuant to a contract for services. The point has been concluded by binding authority.

In *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1995] 3 MLJ 369, at p. 391, the Federal Court laid down the applicable test in the following terms:

> In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat F.J. in *Dr A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at p. 311. We accordingly hold that a workman under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for services is not a workman under the Act. We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resort to this test.
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> In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.

In the present instance, the Industrial Court applied the test laid down in the foregoing passage. After examining the totality of the evidence before it and after considering all the features of the several agency leaders contracts the Industrial Court concluded that the respondents had been engaged under a contract of service. The Industrial Court also correctly concluded that the respondents had been engaged in two capacities, both as agents as well as agency leaders. It was the contract for the latter engagement that was the subject matter of the alleged dismissal. And it was with the nature of the engagement under the latter contract that the Industrial Court was concerned. We are therefore in agreement with the submission of counsel for the respondents that the Industrial Court adopted the correct approach, asked itself the right question and took into account relevant considerations when making the impugned award. It follows that the award under challenge does not contain any error of law in the wider *Anisminic* sense. See, *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317. The Industrial Court did not therefore exceed its jurisdiction.

Second, it is clear from the decisions in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 and *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor. (ibid)* that the question whether a person is a workman is one of mixed law and fact for the Industrial Court to decide. "The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for *(sic)* service": (per Chang Min Tat FJ in *Dr A Dutt v. Assunta Hospital (ibid)* at p. 310).

It is well settled that *certiorari* goes only in cases where an error of law is disclosed. The remedy is not available to correct erroneous findings of fact made by a public decision-maker. See, *William Jacks & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235; [1997] 3 AMR 2585; *Sawarn Singh v. State of Punjab* AIR [1976] SC 232.

In the present instance, the arguments advanced in support of the appeal are in reality a criticism of the facts found by the Industrial Court. It is therefore not permissible to issue *certiorari* in the circumstances of the present case.

Although counsel did not specifically address the point, there is one other matter of which we must make mention in the present context. Even if the appellant's attack upon the award in the present case is to be read as being grounded upon *Wednesbury* unreasonableness, we are satisfied that any reasonable tribunal would, upon the findings of fact made by the Industrial Court, which it was perfectly entitled to make, have come to the same conclusion, namely, that the contracts that the respondents had with the appellant were contracts of service.

Lastly, there is in our view a point of principle that stands in the way of the appellant which is the result of jurisprudence that has flowed since the judgment appealed from. In *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd.* [1997] 3 CLJ 777; [1997] 2 MLJ 685, the Federal Court held that the taking of a preliminary objection as to the threshold jurisdiction of the Industrial Court, as was done in the instant case, does not fall within the scheme of the Act and should not, save in a limited class of case, be countenanced. The relevant passages in the judgment in that case appear at pp. 697 and 699 of the report. The passage (at p. 697) reads as follows:

> We are of the view that, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection, for the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial disputes. And permitting preliminary objections to the threshold jurisdiction being taken will only delay industrial adjudication.

The second passage (at p. 699) reads:

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s. 20(1) were made out of time, he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

Although these views were expressed in the context of an application for an order of prohibition, we consider them to be equally applicable to *certiorari.*

We have before us yet another instance illustrative of the grave injustice that ensues when a preliminary objection is entertained by the Industrial Court. Here is a case where the Minister made the reference in 1985. Now, after the passage of almost 14 years, all we have is a finding that the respondents are workmen. The other critical issues; whether the respondents were dismissed and whether their dismissal was for just cause; are yet to be decided. Most surely, this cuts across the very purpose for which Parliament passed the Act.

The learned judge in the High Court was, for the reasons given in this judgment, entirely correct in refusing the appellant the relief it claimed. The appeal is dismissed. The orders made in the court below are affirmed. The matter is remitted to the Industrial Court with a direction to speedily dispose of the dispute in question upon its merits. The appellant must pay the costs of the appeal to the respondents. The deposit paid into court shall be paid out to the respondents to account of their taxed costs.